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RECENT CASES

CORPORATIONS — *ULTRA VIRES* — LIABILITY OF ONE RECEIVING CORPORATE CAPITAL IN PAYMENT OF PERSONAL DEBT OF STOCKHOLDER. — A corporation paid out of its capital stock a personal debt due from a stockholder to the defendant. The defendant, however, was not aware that payment was made out of capital. The assignee of the corporation for the benefit of creditors seeks to recover the sum paid to the defendant. *Held*, that he cannot recover. *Memphis Lumber Co. v. Security Bank & Trust Co.*, 226 S. W. 182 (Tenn.).

For a discussion of the principles involved in this case, see NOTES, page 888, *supra*.

TRADE UNIONS — BOYCOTTS — BOYCOTTS ON MATERIALS. — The plaintiff, a manufacturer of printing presses, refused to recognize a union among its workmen. Two of the other three manufacturers of printing presses in the country had notified the union that this action would necessitate their abandonment of the union shop which they had previously recognized. The officers of the union thereupon sought to prevent the members in other states from installing, delivering, or repairing the presses of the plaintiff. The plaintiff sued for an injunction against these acts by the officers. The defendants set up the Clayton Act (38 STAT. AT L. 730). The two lower courts dismissed the bill, and the plaintiff appealed. *Held*, that the judgment be reversed, and the injunction be granted. *Duplex Printing Press Co. v. Deering*, 41 Sup. Ct. 172.

For a discussion of the principles involved in this case, see NOTES, page 880, *supra*.

TRADE UNIONS — STRIKES — STRIKES TO SECURE THE RE-EMPLOYMENT OF DISCHARGED FELLOW-WORKMEN. — The defendants quit work because one of their fellow-workmen was discharged. It was admitted that the defendants had done nothing else that could be questioned. The employer brought a bill to restrain the defendants from continuing to strike. *Held*, that the injunction be granted. *Mechanics' Foundry & Machine Co. v. Lynch*, 128 N. E. 877 (Mass.).

For a discussion of the principles involved in this case, see NOTES, page 880, *supra*.

BOOK REVIEWS

THE LAW OF CONTRACTS. By Samuel Williston. New York: Baker Voorhis and Company. 1920. In four volumes. pp. xxiii, 1155; xxi, 1158-2329; xxii, 2331-3456; 3457-4182.

The book does not intend or pretend to be a concise statement of the propositions constituting the law of contracts. Neither does it confine itself to a consideration of simple contracts alone. It deals also with "specialties," or contracts under seal, and with "quasi-specialties," or mercantile specialties, that is with negotiable instruments. It goes so far, in order to make its treatment of the subject exhaustive, as to incorporate within its pages the whole text of the uniform Negotiable Instruments Law.

It is important to define the province sought to be covered by an author, because otherwise there cannot be made any analysis or comment which will be fair or indeed entirely applicable to the subject matter. A concise, succinct, plain statement of what the law is, or what the author believes the law should be on the main fundamental principles of contract, — like Langdell's "Summary of Contracts," — is one thing; an exhaustive, all-comprehensive, argumentative, analytical discussion of all, or most, of the questions involving the law of contracts, even though the discussion leads us into other realms of law, — like this book of Mr. Williston's, — is quite another.

To criticize one because it is not the other would be to misapprehend the purpose of a review.

A monumental treatise on contracts, a treasure-house of the accumulated learning of centuries on the subject, an exhaustive exposition of the principles which constitute this branch of law, accompanied by a critical analysis of them, running with and through their statement, was needed, and this book answers the need.

It will not do for a classroom text-book, but as a book of reference for students of the law, in law schools and in practice, it will be eminently useful, helpful, and valuable. It is the last word in scholarly and scientific treatment of the wide-reaches of the subject, bearing in mind that it is intended to be a maximum and not a minimum of exposition.

The author has taken the liberty of expressing his own views on various mooted questions. This he had a right to do and would be expected to do, and has thereby rendered a very distinct and valuable service. That his views are not always defensible does not make them any less interesting or noteworthy.

For illustration of the few regrettable inadvertences in the work, reference may be had to Section 69. The caption of this section presages the error which is elaborated in the text of that section. The caption asserts that "communication may be necessary to acceptances of unilateral contracts when the act requested is peculiarly within the knowledge of the offeree." The error is not corrected in the text, of which the foregoing quotation is the preface.

Now the fact is that nothing in the law of contracts requires a communication save a promise. An act to be complete does not require communication. That should be self-evident. Therefore, the proposition which forms the index of this statement cannot be said to be true. The truth is that where the act which creates the contract by constituting the acceptance of an offer contemplating a unilateral contract is peculiarly within the knowledge of the offeree, there is a condition implied to his right to sue upon the obligation, *which has already been created*, that he take reasonable means to give notice to the promisor that his obligation *has* arisen. There is no requirement in law that the notice *reach* the promisor; in other words, it need not be *communicated* to him at all in order to perfect the right of the promisee. It is enough if the promisee has pursued a reasonable method of *dispatching* a timely notice. We wish that this confusion might have been avoided.

Again, the author states in substance, in Section 70, that if the offeror contemplates a bilateral contract, but says that the counter promise may be made by an act or a sign, then the bilateral contract will be created by that act or sign, although there be no communication of it to the offeror. And he quotes *Household Insurance Company v. Grant*,¹ which involved a stock allotment contract, which was, as stock allotment cases usually are, a unilateral and not a bilateral contract. That is to overlook entirely the nature of a promise, which, indeed, in another portion of this same section, the author well recognizes. There can be, in the nature of the thing, no promise without a communication, and even the offeror cannot change its nature, however much he

¹ L. R. 4 Ex. Div. 216 (1879).

may wish or intend to do so. No one can waive one of the promises necessary to a bilateral contract, which must consist of promise for promise. It was a notice, required to be given as a condition implied in law, where the act or fact upon which a promisor's liability depends is peculiarly within the knowledge of the other party, with which the court is really dealing in such stock allotment cases, as the Grant Case and Hebb's Case and Harris' Case (both cited in the Grant Case), upon which it was based. In such cases the requirement is not that the notice shall be given, that is, communicated, but only that reasonable efforts, like posting a letter properly addressed and stamped within a reasonable time, shall be made. The offer in such a case is really this: "If you [the Company] will allot me 100 shares of stock I will pay you \$10,000," — an offer contemplating a unilateral contract, created when the act of allotment is done. *Adams v. Lindsell*,² establishing the erroneous doctrine, in cases of bilateral contracts, was decided by a court which felt itself constrained to its decision by a difficulty which had no existence in fact.

So again, in connection with the portions of the book dealing with the question of the right of a beneficiary of a contract, the proposition there stated cannot be approved, nor the reasoning said to be satisfactory. In Section 114 the proposition which is condemned by the author is not the proposition which the principles of the law of contracts require or embody. The sound principle is not only that the consideration must move from the promisee, but that the plaintiff in an action on contract must be both promisee and the party who furnished the consideration. The true point is that the consideration must move from the plaintiff, *who must also be the promisee*. The proposition having been stated by the author in the other form, the alternative form, of "promisee or plaintiff," is easily destroyed as a man of straw. If the promisee furnishes the consideration, a valid contract is made and, as is correctly stated in the text of Section 114, the difficulty arises in allowing some one who was not the promisee to recover on the promise. Consonantly with the logical principle of contract law, there is not only a "difficulty" in allowing such recovery, — there is an impossibility. In the history of the simple contract it was necessary for the plaintiff to show detriment suffered by him, to wit: that he had been deceived by the defendant's promise into giving something up. If he could not show this, he was non-suited, because the action of *assumpsit* (simple contract) came into the law as an action on the case in the nature of deceit, and if the plaintiff had not been deceived to his injury, he could not avail himself of that form of action. The argument of the author is not made more convincing by the reference to a novation, because there the plaintiff always furnishes the consideration, namely, his release or promise to release his former debtor.

The case of *De Cicco v. Schweizer*³ is cited in the author's note to this section. But no help for his contention can be gained from that case because there the plaintiff furnished *part* of the consideration and there is no rule required by the logic of the matter that the plaintiff shall furnish *all* of the consideration. It is enough that he suffer a detriment at the request of the promisor.

Doubtless the author was moved to his position by the feeling that such contracts *should be enforceable by the beneficiary*, as a matter of business expediency. Indeed he says so. In Section 357 his language is: "Contracts for the sole benefit of a third person should be enforceable." Even if that be true, it cannot be done, under sound principles of contract; and if parties seek to secure rights by means other than those sanctioned by the law which they are invoking, there is no help except in the almost universal efficacy of a statute.

² 1 B. & Ald. 681 (1818).

³ 221 N. Y. 431 (1917).

No better demonstration of the impossibility of finding a satisfactory ground upon which to sustain an action by the beneficiary of a contract can well be discovered than will be found in the very decisions in which recoveries, by such beneficiaries, have been allowed, beginning with the "leading case" of *Lawrence v. Fox*⁴ and ending with the last decided case on the subject.

On the other hand, it is gratifying to note the clear and decided stand taken by the author in behalf of the sound view on some long mooted questions. The controversy which has long occupied the thoughts of scholars as to whether an act, or a promise to do an act which one is already under a contractual obligation to perform, can be a consideration for a promise, never merited the expenditure of ingenuity which has been employed in connection with it. The defense of the affirmative of the proposition has exhausted every argument, good and bad, which could well be conceived. And yet, if we start with the proposition that nothing can be a consideration for a promise save the surrender of a legal right or a promise to surrender a legal right, then the attempt to defend the affirmative of the proposition would seem to have been vain from the outset. Langdell, Pollock, Holmes, and Anson, among many writers, have notably contributed to the controversy. The author of the book under consideration sums up, after thorough exposition of the subject and the arguments on both sides, the sound view that such an act or promise cannot be a consideration, in a few terse sentences:

"Section 130. . . . On principle, the second agreement is invalid, for the performance by the recalcitrant contractor is no legal detriment to him, whether actually given or promised, since, at the time the second agreement was entered into, he was already bound to do the work; nor is the performance of the second agreement a legal benefit to the promisor, since he was already entitled to have the work done. In such situations and others identical in principle, the great weight of authority supports this conclusion. In a few jurisdictions, a contrary view has prevailed."

Perhaps the most valuable and distinctive characteristic among the many valuable features of this book, namely the fearlessness with which the author stamps in no uncertain terms and with clearness of logic and irrefutable argument those vicious errors which have crept in, in one way or another, but which should be extirpated for the everlasting good of the science, can be illustrated in no better way than by his attack upon the false doctrine of "anticipatory breach." That doctrine, as the author well demonstrates, is not and never has been defensible. The erroneous conception which Mr. Williston refutes arose in "a hard case" where there was some plausible pretext for the belief that the contract created a "status" which was violated by words or acts inconsistent therewith, although there had been, in fact, no breach of promise. There can be no fine-spun reasoning which will successfully make that a breach of promise which, in fact, is not a breach of promise. It should be sufficiently clear that a promise cannot possibly be broken until the time for its performance arrives. To say that it may be broken by anticipation is to say that which, in the nature of things, cannot be so. One has only to look at the result of the doctrine to see how far from principle it strays. When the courts struggle with the question of the measure of damages for anticipatory breach of contract, they demonstrate the unscientific and illogical basis of the whole doctrine. Damages for an anticipatory breach become a matter of pure speculation and guesswork, and a jury is left to uncertain and indefinable tests which are condemned universally in all other instances of breach of contract.

The argument in behalf of the doctrine of anticipatory breach is not helped, as some would have us believe, by the attempt to import "conditions" which are said to be "implied in law." There are no conditions implied in law in

⁴ 20 N. Y. 268 (1859).

such cases, either in fact or in any decision made by any court, that we know of, attempting to support this doctrine. Any erroneous doctrine can be supported if there were allowed to be imported into the question enough "implications," either of fact or of law; but it is obvious that that would only be making contracts for the parties, which, in this particular instance, would be inconsistent with the contract which the parties have actually made. "Conditions," which are so called "implied in law," are never imported into a contract in violation of the terms of the same, although they are made "out of whole cloth," to work justice between the parties in the performance of the contract, but never in the creation of a contract under direct derogation of the provisions agreed upon by the parties.

One wishes that in all instances (as has been well done in some instances) in which serious errors have been made by text-book writers and by courts, arising either from carelessness in the statement of principles or from lack of precise and accurate knowledge of the subject, the errors had been branded as such once for all, and a clear statement made not only of the errors themselves, but of the propositions in their correct form. For example, there are found repeatedly in text-books and in cases the statement that infant's contracts are voidable, except contracts for necessities. The truth is that an infant's contracts, *including* his contracts for necessities, are voidable. The recovery which is had against an infant for necessities, for which he has contracted to pay, is not upon his promise at all, if he has chosen to avoid it, but in quasi-contract; and the amount recovered is not the amount which he promised, but the reasonable or market value.

All this may be gathered by putting together various parts of the discussion, historical and otherwise, contained in pages 427 to 483; but it would have been a valuable service, added to the other valuable features of this book, if the erroneous and incorrect statements of the general principle on this topic had been indelibly stamped *at the outset*, to be *followed* by the important historical and other material, in the extended exposition which marks this and other topics.

It may be noted in passing that the scheme of page headings in connection with "Capacity of Parties" has not been carried out. The pages in Chapter VIII, dealing with infants, are uniformly headed "Capacity of Parties, Infants." But the pages of Chapters IX and X, dealing with "Insane and Intoxicated Persons," and "Married Women and Corporations," respectively, are not similarly marked with appropriate headings. A uniform plan in this regard would have increased the ease of reference.

In conclusion, it may be said that perfection cannot be attained in any piece of writing, certainly not in the case of a treatise upon an important branch of a science. The most which can be done is to deal with the subject in as clear and scientific a way as possible, and by the employment of accepted authorities and the canons of sound reasoning eliminate as many as may be of the mistakes, confusions, and false precedents which grow up and obscure any branch of knowledge which is in frequent use, and which is made the subject of constant application.

This work is, everything considered, and laying aside the empty hope of perfection, a great contribution not only to the learning of the law of contracts, but to the art of writing law books. It is written scientifically and conscientiously and understandingly. It is clear and unambiguous in its expressions, and even where in places it seems to fall into inadvertences, there is happily no mistaking the author's meaning. Would that all text-books and, indeed, all decisions of courts, were thus written! There would be, in that case, a certainty that the time would come when the science would be perfected and justice under law be swiftly and certainly administered.

Nothing could be cited as more conclusive evidence of the rare excellence of

the book, nor disclose the orderly mind out of which the work was fashioned, than the "Table of Contents," which is very detailed, very clear, very carefully and accurately divided, and very illuminating as to the whole character of the book. It tells not only where everything will be found, but, for the most part, what each of those things will be when it is found. Where the thing cannot be considered as settled, the proposition in the index is stated in the form of a question, which is answered as far as may be in the text.

There are text-books and text-books. The number reaches almost to infinity. They are good, bad, and indifferent, — mostly bad and indifferent. This book under review furnishes an example of what a good text-book may be. Any one would be justly proud to have written it. The student, the profession, the bench, and the bar are alike blessed by the opportunity to use it; and, perhaps better still, the science of law is advanced and improved by this highly meritorious contribution.

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JURIS ET JUDICII FEICIALIS, SIVE JURIS INTER GENTES, ET QUESTIONUM DE EODEM EXPLICATIO. By Richard Zouche. Edited by Thomas Erskine Holland. In two volumes. Washington, D. C.: The Carnegie Institution. 1911. pp. xvi, 16, 204; xvii, 186.

DE JURE NATURAE ET GENTIUM DISSERTATIONES. By Samuel Rachel. Edited by Ludwig von Bar. In two volumes. Washington, D. C.: The Carnegie Institution. 1916. pp. 16, 335; 16, iv, 233.

SYNOPSIS JURIS GENTIUM. By John Wolfgang Textor. Edited by Ludwig von Bar. In two volumes. Washington, D. C.: The Carnegie Institution. 1916. pp. 28, vi, 168; 26, v, 349.

The publication of Grotius' *De Jure Belli ac Pacis* in 1625 made an epoch. Writers on international law may be classified accordingly as *pre-Grotian* or *post-Grotian*. The *pre-Grotian* works published in the series entitled Classics of International Law have been reviewed heretofore.¹ The volumes now to be reviewed are *post-Grotian*. More accurately, they are works written by Grotius' junior contemporaries.

It ought to be enough to arouse interest in Zouche to say that his *Juris et Judicii Feicialis, sive Juris Inter Gentes, et Quaestionum de Eodem Explicatio*, was the first treatise on international law written by an Englishman. The earliest edition was published in 1650. It is here presented in facsimile, with an introduction by Sir T. E. Holland, lately Professor of International Law in the University of Oxford, and with a translation by J. L. Brierly.

Zouche was born in 1589; and he died in 1661, having spent a long life in activities whose scope is indicated by saying that he was Regius Professor of Civil Law at Oxford, Member of Parliament, Judge of the Court of Admiralty, and author of about sixteen published works, most of them dealing with law. He was a successor to the professorial chair of Gentilis, the Italian scholar who was the first to write of international law in England. Though Zouche was a contemporary of Grotius, his own writings on international law were subsequent to Grotius' *De Jure Belli ac Pacis*. Thus Zouche was obviously not the earliest of the famous writers on the subject of this work; and indeed he himself was careful to acknowledge indebtedness to predecessors.

Professor Holland, after pointing out defects in arrangement, concludes that Zouche made two valuable contributions, in that he was the first to emphasize